IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)	
	)	**C.R. No. 9807015270**
vs.	)	
	)	
TIMOTHY C. KELLY,	)	
	)	
Defendant.	)	

Submitted July 26, 2006
Decided August 23, 2006

Carole E.L. Davis, Esquire, Deputy Attorney General.
Michael R.Abram, Esquire, counsel for Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

In this action, the Defendant is charged with violation of 21 *Del. C.* § 4177(A) (4) for allegedly driving a vehicle under the influence of alcohol, and with violation of 21 *Del. C.* § 4107(a) for allegedly failing to obey a traffic device. Defendant moves to dismiss the action on the ground that both charges are barred by the statute of limitations.

BACKGROUND

On July 22, 1998, the Defendant was arrested in the city of Rehoboth Beach in Sussex County, Delaware for the aforementioned offenses. On the same date, the arresting officer issued the Defendant a Complaint and Summons to appear at J.P.Court #2 on July 25, 1998. The Defendant failed to appear and

the J.P. Court issued a capias for his arrest on August 12, 1998. On May 26, 2006, the Defendant's attorney entered his appearance in this matter on behalf of the Defendant and requested that the case be transferred to this Court. The State filed the Information with this Court on June 15, 2006.

The Defendant filed this motion on June 16, 2006. The Delaware Legislature enacted, and on July 6, 2006 the Governor executed, Senate Bill No. 334, which creates an exception to the running of the statutes that would be applicable to facts identical to those presented in the case *sub judice*. The State filed its response on July 19, 2006. The motion was schedule to be heard on the day of trial. However, at the commencement of the hearing the Defendant requested a continuance so that he could reply to the State's response. The Court granted the continuance request, however, the Defendant failed to file a reply.

DISCUSSION

The Defendant contends that the applicable statute of limitations for the alleged violations is two years pursuant to 11 *Del. C.* § 205(b)(3). The Defendant also claims that the statute of limitations has expired. The State urges, however, that the statute of limitations does not apply to motor vehicle offenses, and that said offenses may be prosecuted at any time. Alternatively, the State alleges that if the statute of limitations applies, it properly commenced prosecution when the Officer presented the Defendant with the Complaint and Summons on July 22, 1998.

Applicable Statute of Limitations

The statute of limitations for a particular criminal offense depends upon the classification of the offense. 11 *Del. C.* § 205. Subsection (b) provides that prosecution for an unclassified misdemeanor must be commenced within two years after the offense was committed. Section 233 of Title 11 sets forth the definition and classification of criminal offenses under Delaware law. It defines a 'crime' or 'offense' as an act or omission that is forbidden by statute and is punishable upon conviction by imprisonment or fine. 11 *Del. C.* § 233(a). Additionally, the statute provides that an offense is classified as a felony, violation or misdemeanor, as designated by the law creating the offense. However, if the law does not designate the classification of the offense, the violation is a misdemeanor. 11 *Del. C.* § 233(b).

The violations alleged in the Information filed in this case are forbidden by statute and upon conviction they are punishable by imprisonment or a fine. Thus, they are criminal offenses under Delaware law. Additionally, the statutes do not designate whether the cited offenses are felonies, violations or misdemeanors for a first offense[1]. The alleged offenses therefore are

[1] The State argues that a § 4177 offense should be classified as a violation because the penalty subsection employs the term "violation." The Court is unconvinced by this argument and finds that the term "violation" as used in the penalty subsection is not used to designate the classification of the offenses; the term merely describes the applicable penalty if a person is found to have engaged in the conduct prohibited by the statute. Furthermore, the plain language of § 4177(d) classifies a third violation of subsection (a) as a Class G Felony and a fourth or subsequent offense as a Class E Felony. The State's position is clearly inconsistent with the plain language of the statute. Furthermore, the same statute of limitations applies whether the classification is a violation or an unclassified misdemeanor. 11 *Del. C.* § 205(b)(3).

unclassified misdemeanors pursuant to 11 *Del. C.* § 233(b). Under 11 *Del. C.* § 205, the applicable statute of limitations is two years.

Commencement of Prosecution

The Defendant relies on the plain language of 11 *Del. C.* § 205(g) to support his position that prosecution in this case was not commenced until the State filed the Information with this Court on June 15, 2006. That subsection provides that "*for purposes of this section,* a prosecution is commenced when either *an indictment is found or an information is filed.*" (Emphasis added.) The State argues that the language of subsection (g) should be interpreted to include prosecutions commenced in the J.P. Court initiated by issuance of a Complaint by the arresting officer.

Although neither party has raised the issue, the Court also finds it noteworthy that on June 30, 2006 the Delaware General Assembly passed Senate Bill No. 334, which the Governor signed into law on July 6, 2006. Senate Bill No. 334 amends § 205(h)[2] to establish that the statute of limitations does not run "[d]uring any time when the accused in a prosecution has become a fugitive from justice by failing to appear for any scheduled court proceeding related to such prosecution for which proper notice under the law was provided or attempted." The legislative history indicates that the Bill was enacted to ensure

[2] Prior to amendment, §205 (h) provided that "the period of limitation does not run: (1) During any time when the accused is fleeing or hiding from justice so that the accused's identity or whereabouts within or outside the State cannot be ascertained, despite a diligent search for the accused; or (2) During any time when a prosecution, including a prosecution under a defective indictment or information, against the accused for the same conduct has been commenced and is pending in this State." In the present case the Defendant claims that for the past eight years he has lived openly in Pennsylvania and California. The State has not contended it made a diligent search for the Defendant but that it could not ascertain his whereabouts. Thus, § 205 (h) (1) does not apply to stop the running of limitations in this matter.

that periods of time during which a defendant has an outstanding capias or warrant for failing to appear are not included in determining whether the statute of limitations has expired. Although the amendment is directly on point with the facts now before the Court, application of the amendment would violate the "*Ex Post Facto*" clause of the United States Constitution[3].

The Constitutional *ex post facto* clauses prohibit the federal and state governments from enacting laws with certain retroactive effects on criminal law. *Stogner v. California*[4]. In *Stogner*, the United States Supreme Court held that the government violates the *ex post facto* clause when a law creates a new criminal limitations period that extends the time in which prosecution is allowed when the statute of limitations has previously expired, because it in essence revives a previously time-barred prosecution. *Id*. Thus, the retroactive extension of a statute of limitations for a criminal offense that was barred by the statute of limitations under previous law is a violation of the *ex post facto* clause.

The effect of the amendment to § 205(h) is that the statute of limitations is extended by excluding the time period whereby a defendant has an outstanding capias or warrant from the calculation of the statutory period in which prosecution may be commenced. It is the opinion of the Court that the amendment may not be applied retroactively to the case at bar because to do so would violate the *ex post facto* clause. Accordingly, the Court will apply § 205 as it existed prior to the most recent amendment.

[3] U.S. Constit. Art.1, § 9, cl. 3 & 10.
[4] 239 U.S. 607, 610 (2003) (citing Art. 1, § 9, cl. 3 (Federal government); and Art. 1, § 9, cl. 10 (State government).

Upon a plain reading of the statute, the legislature has designated that for purposes of determining whether a criminal proceeding is barred by the statute of limitations, prosecution begins when an indictment is found or the State files an information. 11 *Del. C.* § 205(g). Neither an indictment was found nor an information filed in the case *sub judice*, until the Information was filed with the Court on June 15, 2006. The State urges the Court to find that prosecution also commences when the arresting officer issues a defendant a traffic complaint and summons, because this is a manner in which prosecution may be initiated in the J.P. Court.

In support of its position, the State relies on *State v. Lynch*[5], in which the Superior Court interpreted the language of 10 *Del. C.* § 9902(a) to mean that the State has a right to appeal a final order of a lower court where the order constitutes a dismissal of an indictment, information or complaint. To reconcile the seemingly limiting language of § 9902(a) and the statute granting the Superior Court authority to hear appeals from the J.P. Court, the Court reasoned that for the purposes of interpreting § 9902, complaints and informations were essentially the same thing; "written accusations against a person charging him with a particular offense." Thus, the court permitted the State's appeal, finding that the Legislature intended appeals from the J.P. Court to be included within the appellate jurisdiction of the court.

[5] CR. A. No. S88-05-0000A, October 18, 1987 (J. Chandler).

Although the Superior Court determined that a complaint and information should be treated identically for purposes of interpreting § 9902, the rationale in *State v. Lynch* applies to appellate jurisdiction and not to an analysis of the limitation of actions; this Court cannot ignore the plain language of § 205. The context of this case is different in that the plain language of § 205 does not conflict with any other authority granted to this Court. Unlike the Superior Court in *Lynch*, this Court is not faced with reconciling contrary statutory provisions, and *Lynch* is not applicable to the case at hand.

Furthermore, it is clear that complaints and informations are indeed different methods of commencing prosecution. Although each is a written statement of the essential facts constituting the offense charged, and must include the relevant statute, rule or regulation, a complaint need only be made by oath or affirmation by a complainant before a person authorized by law to perform a notarial act. An information, however, must be signed by the Attorney General. The Court concludes that the Legislature did not intend for the two types of charging documents to be treated identically for purposes of § 205 and that it intentionally excluded the less formal summons and complaint, or "ticket," from the statutory means of tolling the limitations period. If one of the exceptions set forth in § 205 (h) do not apply, to preserve a criminal misdemeanor action commenced by complaint from the running of the statute of limitations, the State must file an Information within two years of the date the crime is committed.

Although the Court may not apply the current amendment to the case at hand for reasons discussed *supra*, it does note that the amendment shows that the Legislature identified and addressed an apparent "loophole" in the statute. The synopsis section of Senate Bill 334 states that the purpose of the amendment is to prohibit those defendants who fail to appear in the Justice of the Peace Court until after the statute of limitations has expired and then have the matter transferred to the Court of Common Pleas "*where it is subject to dismissal* because the Information commencing the prosecution in that Court has been filed outside" the statutory period (emphasis added). The Court finds it compelling that after determining the statute was problematic, the Legislature did not alter the language of subsection (g) to include the filing of a complaint as the commencement of prosecution. Instead, it carved out a specific exception to deal with a very precise scenario. Accordingly, the Court concludes that the Legislature did not find the limiting language of subsection (g) to be problematic, nor did it intend for prosecution to commence upon the filing of a complaint. Therefore, I hold that prosecution "commenced" in this case (for the purposes of tolling the limitations period) when the State filed the Information in this Court on June 15, 2006.

CONCLUSION

The Court finds that the offenses charged in the Information are misdemeanor offenses. Thus, the two-year statute of limitation applies. Prosecution commenced almost six years after the statute of limitations expired

and the State is barred from prosecuting the Defendant on the stated charges. Therefore, the Defendant's Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED, this ____ day of August 2006.

_____
Kenneth S. Clark, Jr., Judge